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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA

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BRIAN GLAUSER, individually and on
behalf of all other similarly situated,

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Plaintiff,

No. C 11-2584 PJH

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v.

11 ORDER GRANTING MOTIONS
12 TO STAY

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TWILIO, INC., et al.,

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Defendants.

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Defendants' motions to dismiss the complaint and in the alternative, to stay or
transfer the action, came on for hearing before this court on January 25, 2012. Plaintiff
Brian Glauser ("plaintiff") appeared through his counsel, Rafey Balabanian. Defendant
Twilio, Inc. ("Twilio") appeared through its counsel, Patrick Thompson and Audrey Lin, and
defendant GroupMe, Inc. ("GroupMe") (collectively "defendants"), appeared through its
counsel, Bryan Merryman. Having read the parties' papers and carefully considered their
arguments and the relevant legal authority, and good cause appearing, the court hereby
GRANTS defendants' request for a stay pending resolution of certain disputes before the
Federal Communications Commission ("FCC"), for the reasons indicated at the hearing,
and summarized as follows.

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Defendants each challenge plaintiff's complaint on primary jurisdiction grounds,
arguing that the FCC has undertaken consideration of the very issues raised by plaintiff's
complaint, and that the court should defer any ruling on the issues until such time as the
FCC has exercised its expertise in deciding the issues first. The primary jurisdiction
doctrine "is a prudential doctrine under which courts may, under appropriate circumstances,

1 determine that the initial decision-making responsibility should be performed by the relevant
2 agency rather than the courts.” See Davel Commc’ns, Inc. v. Qwest Corp., 460 F.3d 1075,
3 1080, 1086 (9th Cir. 2006) (doctrine applies to claims properly cognizable in court that
4 contain some issue within the special competence of an administrative agency); see also
5 Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc., 307 F.3d 775, 780 (9th Cir. 2002).
6 The doctrine is applicable whenever the enforcement of a claim subject to a specific
7 regulatory scheme requires resolution of issues that are within the special competence of
8 an administrative body. See Davel Commc’ns, 460 F.3d at 1086. The doctrine is
9 furthermore appropriate where conduct is alleged which is “at least arguably protected or
10 prohibited by a regulatory statute,” and agency resolution of an issue “is likely to be a
11 material aid to any judicial resolution.” See, e.g., GTE.Net LLC v. Cox Commc’ns, Inc., 185
12 F. Supp. 2d 1141, 1144 (S.D. Cal. 2002)(granting motion to stay on primary jurisdiction
13 grounds).

14 While no fixed formula exists for applying the doctrine, the Ninth Circuit traditionally
15 looks to four factors that must be satisfied for the doctrine to apply: (1) the need to resolve
16 an issue that; (2) has been placed by Congress within the jurisdiction of an administrative
17 body having regulatory authority; (3) pursuant to a statute that subjects an industry or
18 activity to a comprehensive regulatory scheme that; (4) requires expertise or uniformity in
19 administration. See Davel, 460 F.3d at 1087; United States v. Gen. Dynamics Corp., 828
20 F.2d 1356, 1362 (9th Cir. 1987); see also Clark v. Time Warner Cable, 523 F.3d 1110,
21 1115-16 (9th Cir. 2008)(affirming referral to FCC on issues regarding FCC regulation of
22 emerging VoIP technology)(“[w] have previously approved of the use of the primary
23 jurisdiction doctrine where it is unclear whether a federal statute applies to a new
24 technology”).

25 On balance, these factors are satisfied here. Plaintiff has alleged that defendant
26 GroupMe, who provides a group texting application, and defendant Twilio, who provides the
27 software program to transmit text messages from GroupMe, have each violated the
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1 Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227 et seq., which
2 prohibits the making of any call without the prior express consent of the called party, using
3 an automatic telephone dialing system, to any telephone number assigned to a cellular
4 telephone service. See, e.g., Amended Complaint, ¶¶ 10-11, 17-18, 23, 25-26, 4255-58;
5 see Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 950 (9th Cir. 2009)(setting forth
6 elements of claim under TCPA). Specifically, plaintiff alleges that defendants, through their
7 text messaging applications, tools, and/or technology, made unsolicited text calls to plaintiff
8 and others similarly situated, without their prior expressed consent, using an automatic
9 telephone dialing system. Amended Complaint, ¶¶ 55-57.

10 In its motion to dismiss, however, GroupMe contends that plaintiff’s allegations fail to
11 qualify GroupMe as an auto-dialer for whom liability can be assessed under the TCPA, and
12 furthermore, that the allegations also adequately establish that GroupMe obtained prior
13 express consent for the sending of any group text messages. Defendant Twilio, in its
14 corresponding motion to dismiss, asserts that it is exempt from liability under the TCPA in
15 its alleged role of software provider, since its functional role is that of a ‘common carrier.’

16 The resolution of all three of these issues – who qualifies as an auto-dialer subject to
17 the TCPA; requirements for obtaining valid prior express consent under the TCPA; and the
18 applicability of any ‘common carrier’ exemption to a text message service provider under
19 the TCP – are, generally speaking, matters that are within the jurisdiction of the FCC. See
20 In re Rules and Regulations Implementing the Telephone Consumer Protection Act of
21 1991, Report and Order, 18 F.C.C.R. 14014, 14115 (July 3, 2003); Rules and Regulations
22 Implementing the TCPA of 1991, 68 F.R. 44144-01, 44165 (July 25, 2003); see also
23 Charvat v. EchoStar Satellite, LLC, 630 F.3d 459, 466-67 (6th Cir. 2010)(“Congress vested

24 the FCC with considerable authority to implement the TCPA” and to “prescribe regulations
25 to implement the legislation”).

26 More significantly, however, the FCC’s input with respect to these issues is currently
27 being sought. The FCC’s January 22, 2010 Notice of Proposed Rulemaking, for example,

1 notes that the TCPA is silent with respect to the form that “prior express consent” must take
2 under the TCPA, and accordingly seeks public comment as to the manner of prior express
3 consent it should require vis-a-vis the auto-dialing of cellular services governed by the
4 TCPA. See GroupMe Request for Judicial Notice, Ex. L, ¶ 2, 17, 20 (2010 Notice of
5 Proposed Rulemaking). As defendant GroupMe notes, many of the comments thus far
6 received in response to the FCC’s Notice of Proposed Rulemaking have specifically
7 requested that the FCC also define auto-dialer under the TCPA to take technological
8 advances in recent years (such as text messaging) into account. Similarly, the specific
9 issue whether a text message service provider qualifies as a common carrier exempt from
10 liability pursuant to the TCPA, is also currently under submission before the FCC. See
11 Twilio Request for Judicial Notice, Ex. 1 (Club Texting, Inc. Petition for Declaratory Ruling
12 Before FCC); id., Ex. 2 (FCC Public Notice Seeking Comment on Club Texting Petition).

13 As these issues directly overlap with the legal issues before the court by way of
14 plaintiff’s complaint and defendants’ motions to dismiss, the court concludes that the FCC
15 is in the process of utilizing its recognized expertise to consider issues pending before the
16 court. As such, the prerequisites for application of the primary jurisdiction doctrine are
17 satisfied, and allowing the FCC to resolve the foregoing issues prior to adjudicating the
18 issues in the present action, in order to obtain the benefit of the FCC’s guidance, is
19 appropriate. See *Davel Commc’ns*, 460 F.3d at 1087. While the court is sensitive to
20 plaintiffs’ concerns that allowing the FCC to rule upon the issues before the court will
21 engender unfair delay for plaintiffs, the court also notes that counsel for both sides
22 acknowledged that the Proposed Notice of Rulemaking and Club Texting Petition have
23 already been pending before the FCC for a significant amount of time, suggesting that the
24 likely wait for FCC guidance as to both will be shorter than average. In these
25 circumstances, and furthermore in view of the early stage of the present action, the court
26 finds that the benefit to be provided by FCC guidance on potentially dispositive issues in
27 this litigation outweighs the benefit to plaintiff in allowing the action to proceed. As a result,
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1 the court accordingly GRANTS defendants' request to STAY the current action, pending
2 the FCC's resolution of related issues.

3 In view of the foregoing, the court declines to reach the merits of defendants'
4 remaining arguments with respect to failure to state a claim pursuant to the TCPA.

5 The parties' requests for judicial notice, however, are GRANTED.

6 The case management conference currently scheduled for March 1, 2012 is hereby
7 VACATED (notwithstanding the notation reflected in the minute order). The parties shall
8 file a joint status statement every six months, triggered from the date of this order, to advise
9 the court as to the status of the two matters currently before the FCC, or sooner, should the
10 FCC resolve either or both issues prior to the expiration of the six month period.

11 **IT IS SO ORDERED.**

12 Dated: January 27, 2012



PHYLLIS J. HAMILTON
United States District Judge

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